The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS TURNER, Plaintiff, v. W.W. GRAINGER, an Illinois Corporation; RONALD HANSEN, and his marital community, JOHN DOE MANAGERS and SUPERVISORS and their marital communities, Defendants.	No. C09-1068RAJ **PLAINTIFF'S MOTION TO COMPEL SECOND DEPOSITION OF RONALD HANSEN** NOTE ON MOTION CALENDAR: Friday, March 26, 2010 ORAL ARGUMENT REQUESTED

I. RELIEF REQUESTED

NOW COMES Plaintiff, Thomas Turner, and respectfully requests that this Honorable Court, pursuant to Fed.R.Civ.P. 37 and CR 37, issue an Order to compel Defendant Ronald Hansen, District Sales Manager for Defendant W.W. Grainger ("Grainger"), to appear again for deposition to respond to questions that defense counsel instructed him not to answer concerning a teleconference in which Mr. Hansen met with the Grainger's Risk Management and Human

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Resources officers. The telephone call immediately preceded Plaintiff's suspension by Mr. Hansen and occurred shortly before Plaintiff was terminated by Grainger.

Mr. Hansen testified that with regard to Mr. Turner's termination, he made "a recommendation" during the call with Grainger's Human Resources and Risk Management officers; but the "ultimate decision" was not his. Defense counsel instructed Mr. Hansen to not disclose his recommendation concerning Mr. Turner.

Plaintiff asks the Court to permit discovery of the "recommendation" made by Defendant Ronald Hansen, in addition to knowledge Mr. Hansen possesses regarding the "ultimate decision" to terminate Plaintiff. Plaintiff also asks that Defendant be ordered to pay the fees and costs related to the filing of this motion and for Mr. Hansen's second deposition.

II. STATEMENT OF FACTS

A. PLAINTIFF'S ALLEGATIONS OF DISCRIMINATION AND AFFIRMATIVE DEFENSES ASSERTED BY DEFENDANT.

In this action, Plaintiff alleges, *inter alia*:

> Defendant [Grainger] has a pattern and history of making assurances of benefits including retirement benefits and health insurance security to loyal and successful employees who remain with the company to retirement age.
>
> Defendant [Grainger] has unilaterally changed its practices with a pattern of terminations of loyal and successful older employees which defeat their access to and qualifications for promised longevity benefits.
>
> Defendant [Grainger] has betrayed their commitments to long term older employees by instituting a practice of redefining 'cause' for termination to use minor policy deviations to terminate older employees 'for cause', … rendering their long years of service valueless.
>
> …
>
> After over 20 years of employment Defendant [W.W. Grainger] treated Mr. Turner differently from other employees harming his employment record by

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> classifying his termination as 'for cause' citing issues that other employees were not disciplined or terminated for.

Complaint at 2-4, ¶¶ 2.3-2.5, and 2.12.

Grainger District Sales Manager and Defendant, Ronald Hansen, is alleged to have "personally participated in the employment decisions, discrimination and retaliation against Thomas Turner". *Id*. at 2, ¶ 1.5.

In Defendant's "Answer and Affirmative Defenses", they allege, *inter alia*, that:

> All of plaintiff's claims… may be barred in whole or in part because defendants exercised reasonable care and adopted, implemented, maintained and enforced effective policies and procedures to prevent and correct promptly any purported discriminatory or retaliatory behavior in the workplace. …
>
> Any and all actions by defendants of which plaintiff complains were justified by legitimate business reasons and/or business necessity.
>
> Defendants deny having any wrongful motivation with respect to plaintiff, and assert that the actions of which plaintiff complains would have been taken for lawful reasons independent of any alleged unlawful motivation.

Id. at 4-5, ¶¶ G, I, and J.

B. DISTRICT MANAGER RONALD HANSEN'S DEPOSITION TESTIMONY.

1. Mr. Hansen made a recommendation regarding Tom Turner but corporate management, including Human Resources made the ultimate decision

Mr. Hansen was asked during his deposition whether he had "any decision-making role in whether or not [Mr. Turner] would be terminated?" (Hansen Dep. at 6:20-21, Mann Decl., Exh. A) Mr. Hansen stated that he had "**a recommendation**, [**he**] **was asked for a recommendation, but the ultimate decision was not** [**his**]". (*Id*. at 6:22-23)

Plaintiff's counsel asked Mr. Hansen "who is it that asked you for a recommendation about Tom Turner's employment". Mr. Hansen responded "The people that we were talking

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with [were] **Legal**[;] **Human Resource department**[;] and **Risk Management**". (*Id*. at 8:10-14). After this disclosure, Calvin Keith, counsel for Defendants interjected "to instruct the witness [that] with regard to conversations with Legal, you can't disclose those conversations, those are privileged." (*Id*. at 8:15-18) Plaintiff's counsel stated on the record, "[T]o the extent that Legal was involved in making an ultimate decision of termination or not termination, … that's not necessarily privileged". (*Id*. at 8:20-23).

Plaintiff's counsel next asked Mr. Hansen, "[W]ho specifically asked you for a recommendation, if you can give me a name of the person?" and Mr. Hansen replied that "The people on the … phone call were … the **Risk Management** person who I can't remember, **Helene Sherlock**, **Human Resources**, and **Hank** [**Galatz**]". (*Id*. at 9:4-14).

Plaintiff's counsel subsequently asked Mr. Hansen, "**Did you give a recommendation on that phone call**?" and Mr. Hansen replied, "**I did**." He was then asked, "What was your recommendation?" and Mr. Keith, again interjected, "I'm going to instruct him not to answer again because counsel was present during the phone call." (*Id*. at 9:19-25)

Plaintiff's counsel stated on the record that "**the presence of counsel doesn't insulate it**, only if there's a … communication that is privileged in nature. If this is his **recommendation about a personnel action** and it's **going to Human Resources and decision makers**, don't you think we are entitled to know what that recommendation is?" Defense counsel replied "I understand the issue absolutely, but … I think we are going to have the court help us with it." (*Id*. at 10:1-10)

Plaintiff's counsel added that "from the witnesses that I have talked to, I understand they recommended against it…." (*Id*. at 10:11-23)

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The parties then recessed and discussions were had off the record. (*Id.*)

After a twelve-minute recess, Plaintiff's counsel returned and said to Mr. Hansen, "I understand while we were on the break you were present for the conversation [among your counsel, Mr. Keith and Mr. Galatz] about whether or not you needed to answer that question, is that right?" (*Id.*, at 10:24-11:3) Mr. Hansen acknowledged that he was present for the discussion between Mr. Keith and Mr. Galatz concerning the question. (*Id.*)

Plaintiff's counsel then asked Mr. Hansen, "for the record, what was your recommendation to Helene Sherlock and Risk Management about whether or not to terminate Tom Turner?" (*Id.* at 11:15-17) Mr. Keith interjected "This is again, I'm objecting, for the record, to the extent that if counsel was present during that, but if you made recommendation apart from that feel free to talk." (*Id.* at 11:18-21) Mr. Hansen then testified "Actually, [**I**] **didn't make any recommendation**." (*Id.* at 11:15-22) Plaintiff's counsel asked Mr. Hansen,

"[**I**]**s there a reason you are changing your testimony from what your testimony was before we took the break**?" to which Mr. Hansen answered, "No, only in that it was a -- it was more of a discussion of possibilities and options." (*Id.* at 11:23-12:2). Plaintiff's counsel asked Mr. Hansen "[W]hat possibilities and options were discussed?" Defense counsel promptly interjected, "Same objection. Privileged communication" and instructed Mr. Hansen not to answer the pending question. (*Id.* at 12:3-10)

Mr. Hansen was also asked by Plaintiff's counsel if during the conversation "there [was] any mention of Tom Turner's **longevity** with the company, number of **years of service**?"; "any mention of the **policy of Grainger to give two weeks per year severance**?";

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or "**any mention of Tom Turner's age**?". Defense counsel objected to each of these questions and instructed Mr. Hansen not to answer. (*Id*. at 52:5-23).

Mr. Hansen was asked if "on [the] conference call with Helene Sherlock [Human Resources] and the risk manager … reviewing Tom Turner's … end of year sale, to your understanding **were you seeking legal advice about that matter**?" (*Id*. at 108:6-13)

Mr. Hansen said "**No**.… **We were reviewing**… **policy problems**." (*Id*. at 108:14-17)

Mr. Hansen further testified that, as to this discussion among management, "[m]y purpose was to discuss **if it was a violation of our guidelines**. … [**o**]**r governance policies or business conduct policies**…. And if, so what do we need to do next." (*Id*. at 108:25-109:7)

2. Mr. Turner's alleged misconduct.

Grainger ultimately gave as a reason for terminating Mr. Turner a purchase of a $6,000 Fluke thermal "imager", which he purchased in his own name, using his personal credit card. (*See id. at* 60:15-25) It was a product that Mr. Turner could potentially sell to his customer base at Boeing. (*See id*. at 18:17-19:15) The purchase was made using a Boeing employee account; which is offered to Boeing employees generally by Grainger but is not to be confused with the Boeing Company's corporate account. (31:24-32:20) Mr. Hansen admitted that Grainger (*i.e*., others beyond Mr. Turner) advertises the Boeing employee account number on flyers "handed … out at trade shows" to solicit Internet sales. (*Id*. at 20:12-16; 36:15-16)

Mr. Hansen was not able at his deposition to cite a specific written policy that Mr. Turner's conduct violated. (*See id*. at 110:8-25; 111:1-112:1; 14:2-7; and 22:20-22)

Mr. Hansen also explained that for any "credit" Mr. Turner earned in 2008 toward his sales goal by purchasing the thermal imager, he would receive a "debit" in 2009 when the

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product was returned. (*Id*. at 24:21-25:8). Mr. Hansen could not explain what financial benefit, if any, Mr. Turner might have received by making a purchase in his own name and on his credit card in December and returning it in February. (*See id*. at 16:14-17:13 – "I can't understand [his] motive" – 24:21-25:21; and 29:4-30:16).

Mr. Hansen testified, "[Mr. Turner] said … in the meeting after he met with Security and Risk Management that he did it for me" (Ronald Hansen). The fact is that while Mr. Turner was recognized as an "over achiever" who ended 2008 with his sales at "137 percent of goal" – a level at which padding his sales with $6,000 worth of more sales would be neither necessary nor lucrative for Mr. Turner – Mr. Hansen, in contrast, admitted that as to himself, he and the district he supervised were "close" to meeting goal in 2008, but ultimately fell short.

3. Outcome from Mr. Hansen's call with Human Resources and Risk Management.

Mr. Hansen stated that, after he got off the telephone call that included Mr. Galatz, he walked into Mr. Turner's office and suspended him. (*Id*. at 109:8-14) Following this meeting with Mr. Turner, Mr. Hansen said he was "essentially done with it". Mr. Hansen "informed [his] manager of the situation and [his manager] said okay …." Mr. Hansen "didn't discuss options with his manager", (*Id*. at 109:19-25) as such determinations had already been made during the call with risk management, human resources, and Mr. Galatz. (*See id*. at 12:1-2 and 110:1-7)

III. ARGUMENT AND AUTHORITY

Discovery may be obtained of any matter not privileged that is relevant to the subject matter of the case. Fed. R. Civ. P. 26(b). Information is discoverable if it appears "reasonably calculated to lead to discovery of admissible evidence." (*Id*.)

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In federal court litigation of a federal question case, the federal common law of privilege applies. *See Dole v. Milonas*, 889 F.2d 885, 889 n. 6 (9th Cir.1989) (*citing* Fed.R.Evid. 501). Nevertheless, the federal court may consider state privilege law. *Tennenbaum v. Deloitte & Touche*, 77 F.3d 337, 340 (9th Cir. 1996), *citing Lewis v. United States*, 517 F.2d 236, 237 (9th Cir.1975). Under Washington State law:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

RCW 5.60.060(2)(a).

Several issues are raised by Defendant's assertion of attorney-client privilege in the context of Mr. Hansen's discussion with Risk Management, Human Resources and Mr. Galatz. One is whether Mr. Galatz, an in-house attorney with Grainger, was acting in his legal capacity, as opposed to acting in some other capacity, such as business advisor. Another issue is whether Plaintiff is entitled to the "underlying facts" of their discussion, including Mr. Hansen's recommendation. Assuming *arguendo* that the attorney-client privilege is found to apply to Mr. Hansen's teleconference with Mr. Galatz and others, a third issue raised is whether Defendant implicitly waived such privilege by putting the allegedly privileged communications "at issue" in the litigation.

A. MR. HANSEN'S 'RECOMMENDATION' AND DISCUSSION OF MR. TURNER'S PROPOSED DISCIPLINE WITH RISK MANAGEMENT AND HUMAN RESOURCES WERE NOT MADE FOR THE PURPOSE OF RECEIVING 'LEGAL ADVICE'; THUS THEY ARE NOT PRIVILEGED.

> It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, **in-house legal counsel**

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> **participates in and renders decisions about business … issues**, as well as purely legal issues.
>
> ‘Intent problems arise most frequently in a corporate context when the attorney is in-house counsel. In-house counsel have responsibilities which extend beyond the mere rendering of legal advice- for example, in-house counsel might also act as an executive vice president with designated business responsibilities. The responsibilities as vice-president and lawyer may overlap significantly and the purpose of various communications with others within the organization may begin to blur. **Many courts fear that businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions** and funneling documents through counsel (*viz,* addressing documents to the lawyers with copies being sent to the employees with whom communications were primarily intended). As a result, **courts require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents [or communications] in the privilege's protection**.’
>
> …
>
> No less than any other agent of the corporation, **in-house counsel attorneys personify the entity and the entity must assume responsibility for their actions that are reasonably within the scope of their corporate responsibilities**. *See In re CFS-Related Securities Fraud Litigation,* 223 F.R.D. 631 (N.D.Okla.2004) (‘**Business advice**, **unrelated to legal advice**, **is not protected by the privilege even though conveyed by an attorney to the client**.’) Consequently, in the context of [defendant]’s privilege claims we had to determine the purpose behind both the seeking of the assistance from in-house counsel and the responsive services that were rendered by in-house counsel.

In re Vioxx Products Liability Litigation, 501 F.Supp.2d 789, 797 (E.D. La. 2007), *quoting* Paul R. Rice, 1 Attorney-Client Privilege in the United States, § 7:2, pp. 24-25 (Thomson West 2d ed.1999).

In this case, Hank Galatz, in-house counsel for Defendant, is very similar to the modern corporate counsel described above. According to the periodical *InsideCounsel*, Mr. Galatz works in the Defendant’s Human Resources department and “**reports to both the vice**

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president of human resources and the general counsel".[1] Mr. Galatz is reported to have said, "In working with both individuals, we are constantly challenging each other to **come up with approaches that will reach the best possible solution**." (*Id.*) Mr. Galatz reportedly "spearheads any legal project that falls under the HR umbrella. He handles everything from training and compliance issues to counseling management on employment decisions." (*Id.*) Mr. Galatz is quoted as saying, "Obviously we are continuing to see the consequences a bad decision can bring. … There is an increased need in human resources to have an in-depth understanding of the obligations one may be faced with, but **more importantly**, **we must know how to get to the appropriate solution**." (*Id.*)

> The test for the application of the attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance. … The lawyer's role as a lawyer must be primary to her participation.

In re Vioxx, 501 F.Supp.2d, at 798.

> **[T]he advice envisioned by the attorney-client privilege is advice about the laws imposed on us by society**, **not the rules that we impose on ourselves through guidelines, manuals, or otherwise**. The interpretation and application of the latter does not require either a law degree or admission to a bar association.

In re Vioxx, 501 F.Supp.2d, at 803-04.

According to Mr. Hansen, the discussion with Risk Management, Human Resources and Mr. Galatz was not one in which they sough legal advice. Rather, it was "a discussion of possibilities and options." They were "reviewing policy problems" and discussing if there was a violation of their "guidelines", "governance policies" or "business conduct policies".

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[1] Staff writer, *To the Rescue*, INSIDECOUNSEL, Feb. 1, 2006, at

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Determining such questions does not require a law degree. It is simply a personnel matter, one which is at the heart of Mr. Turner's claims of different treatment. Mr. Hansen indicated that he was "sure Human Resources would be involved" in making the ultimate decision to terminate. The fact that Mr. Galatz, who reports to the Vice President of Human Resources, was present for the discussions leading to the ultimate decision to terminate Mr. Turner should not insulate such discussions from discovery.

B. BY RELYING UPON AFFIRMATIVE DEFENSES OF HAVING 'LEGITIMATE BUSINESS REASONS' AND A LACK OF 'UNLAWFUL MOTIVATION', DEFENDANT HAS PUT THE COMMUNICATIONS INVOLVING MR. GALATZ AT ISSUE, SUCH THAT DENIAL OF DISCOVERY OF THESE COMMUNICATIONS WOULD BE 'MANIFESTLY UNFAIR'.

> In this case, … the content of defendant's communications with their attorney is inextricably merged with the elements of plaintiff's case and defendants' affirmative defense[s]. These communications are not incidental to the case; they inhere in the controversy itself, and to deny access to them would preclude the court from a fair and just determination of the issues. To allow assertion of the privilege in this manner would pervert its essential purpose and transform it into a potential tool for concealment of unconstitutional conduct behind a veil of confidentiality. Under these circumstances, the benefit to be gained from disclosure far outweighs the resulting injury to the attorney-client relationship. The privilege should not apply.

Hearn v. Rhay, 68 F.R.D. 574, 582 (E.D. Wash. 1975). Grainger asserts that "actions of which plaintiff complains would have been taken for lawful reasons independent of any alleged unlawful motivation" and that they "were justified by legitimate business reasons and/or business necessity". However, Defendant refuses to allow Plaintiff discovery of whether there was any mention among decision-makers of Mr. Turner's "longevity with the company", or mention of Defendant's policy of giving two weeks severance per year of service, or any

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http://www.insidecounsel.com/Issues/2006/February%202006/Pages/To-The-Rescue-.aspx?page=3

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mention of Mr. Turner's age. By including Mr. Galatz in its decision-making discussions among Human Resources and Risk Management, Grainger is attempting to "use as a sword the protection which the Legislature awarded them as a shield." *Pappas v. Holloway*, 114 Wn.2d 198, 208 (1990). Under such circumstances, permitting Defendants to block Plaintiff's access to the information vital to proving his case would be "manifestly unfair". *Hearn*, 68 F.R.D. at 581.

IV. CONCLUSION

For the foregoing reasons, Mr. Turner asks that the Court grant this Motion and Order Mr. Hansen to respond to the questions that defense counsel instructed him not to answer and disclose his knowledge regarding the "ultimate decision" to terminate Plaintiff. Plaintiff also requests that Defendant be Ordered to pay the fees and costs related to the filing of this motion and to the taking of a second deposition of Mr. Hansen.

DATED March 11, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date below, I caused to be served the foregoing pleading on the following parties using the CM/ECM system of the U.S. District Court:

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Dated: March 11, 2010.

_/s Mark W. Rose______________________
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